Law Enforcement Digest

SEPTEMBER 2011

Law enforcement officers: Thank you for your service, protection and sacrifice.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

REPORT – In Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (2011) (decision filed June 23, 2011), the United States Supreme Court holds in a 5-4 decision that the Confrontation Clause does not permit the prosecutor to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The Confrontation Clause requires that the accused have the right to confront the analyst who made the certification, unless that analyst is unavailable at trial and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Bullcoming was arrested on charges of driving while intoxicated (DWI). Bullcoming refused the breath test, so the police obtained a warrant authorizing a blood draw. The blood sample was sent to the New Mexico Department of Health, Scientific Laboratory Division for analysis. In a standard form titled "Report of Blood Alcohol Analysis," participants in the testing were identified, and the forensic analyst certified his finding.

At trial the State offered the forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. Because the analyst who signed the certification was on "unpaid leave" the prosecutor called another analyst "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample."

Relying on its prior decision in Melendez–Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527 (2009) **Sept 09 LED:03** (forensic laboratory report stating that a substance is cocaine was testimonial for purposes of the Sixth Amendment's Confrontation Clause and could not be introduced without offering a live witness competent to testify to the truth of the statements made in the report) the Bullcoming Court holds that the defendant has the right to confront the specific analyst who makes the certification, unless the analyst is unavailable and the defendant has had the opportunity prior to trial to cross-examine the particular analyst. In Bullcoming the prosecution did not argue that the analyst on unpaid leave was unavailable.

Justice Kennedy authors a dissenting opinion which is joined by Chief Justice Roberts and Justices Breyer and Alito.

Result: Reversal of New Mexico state court conviction of Donald Bullcoming for Driving While Intoxicated.

LED EDITORIAL COMMENT: In our comments to the Melendez-Diaz case, Sept 09 LED:03, we noted that the Melendez-Diaz majority opinion stated that "notice-and-demand" procedures (see, for example, Washington's Criminal Rule 6.13) under which a defendant is given reasonable notice of an expert's certified report and the right to demand that the expert appear at trial, will generally satisfy Confrontation Clause requirements. Justice Ginsberg's opinion in Bullcoming again points to "notice-and-demand" procedures as satisfying Confrontation Clause requirements while reducing the burden on forensic laboratories. Justice Ginsberg's opinion states: "Furthermore, notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories. Statutes governing these procedures typically 'render . . . otherwise hearsay forensic reports admissible[,] while specifically preserving a defendant's right to demand that the prosecution call the author/ analyst of [the] report.'" However, the section of Justice Ginsberg's opinion that includes this language (Part IV) did not achieve a majority of votes and thus, does not constitute a majority opinion of the Court. It is unclear whether those justices who did not sign Part IV do not believe that

"notice and demand" procedures would suffice, or whether they simply feel that the discussion is not necessary to the opinion.

That said, prosecutors generally agree that "notice and demand" procedures are acceptable. The problem arises, however, when defendants routinely include a "demand" in each and every case. Such a practice effectively renders "notice and demand" procedures ineffective for reducing the burden on laboratories.

(2) FOURTH AMENDMENT EXCLUSIONARY RULE DOES NOT APPLY TO VEHICLE SEARCH INCIDENT TO ARREST CONDUCTED IN OBJECTIVELY REASONABLE RELIANCE ON PRE-GANT CASE LAW; DIFFERENT RESULT UNDER ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION AND STATE V. AFANA – In Davis v. U.S., ___ U.S. ___, 131 S. Ct. 2419 (2011) (decision filed June 16, 2011), a majority of the United States Supreme Court holds that the exclusionary rule does not apply to exclude evidence where police officers conduct a vehicle search incident to arrest in objectively reasonable reliance on binding, pre-Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**, judicial precedent.

Prior to the Supreme Court's decision in Gant, most jurisdictions including Washington followed the general rule that allowed police officers to search a vehicle incident to the arrest of a recent occupant. See New York v. Belton, 454 U.S. 454 (1981). In Gant, the U.S. Supreme Court announced a new Fourth Amendment rule, holding that "an automobile search incident to a recent occupant's arrest is constitutional only if (1) the arrestee is within reaching distance of the vehicle during the search, or (2) the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest.'" **[LED EDITORIAL NOTE: The Washington State Supreme Court has apparently interpreted the vehicle search incident rule more restrictively under article 1, section 7 of the Washington constitution, holding (or at least stating in majority opinions) that a vehicle search incident to arrest is only permissible where it is necessary: 1) to preserve officer safety, or 2) "to prevent destruction or concealment of evidence of the crime of arrest." State v. Valdez, 167 Wn.2d 761 (2009) Feb 10 LED:11. In May the Washington State Supreme Court heard argument in review of two Court of Appeals decisions, State v. Wright, 155 Wn. App. 537 (2010) June 10 LED:12 and State v. Snapp, 153 Wn. App. 485 (2009) Jan 10 LED:06, to consider "[w]hether under the Washington Constitution police may conduct a warrantless search of a car for evidence of the crime for which the driver was arrested after the driver is secured in a patrol car" where there is no reason to believe the evidence may be destroyed or concealed.]**

The search at issue in Davis took place two years prior to the U.S. Supreme Court's Gant decision. Police officers conducted a routine traffic stop that resulted in the arrest of the driver and the passenger (Davis). Both the driver and Davis were handcuffed and placed in patrol cars while the police searched the vehicle incident to arrest. They found a revolver inside Davis' jacket.

The majority opinion explains:

> About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety

> responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act'" under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty.'"
>
> That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion "should not be applied to deter objectively reasonable law enforcement activity." Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.

Result: Affirmance of Eleventh Circuit U.S. Court of Appeals opinion affirming the U.S. District Court (Middle District of Alabama) conviction of Willie Gene Davis for possession of a firearm by a convicted felon.

LED EDITORIAL COMMENT: Davis was decided under the exclusionary rule of the Fourth Amendment to the United States Constitution. In State v. Afana, 169 Wn.2d 169 (2010) Aug 10 LED:09 a unanimous Washington State Supreme Court held that the exclusionary rule of article I, section 7 of the Washington constitution does not contain a case law based good faith exception. Like Davis, Afana also involved a pre-Gant vehicle search incident to arrest which was lawful under pre-Gant case law. Unlike Davis, the Washington State Supreme Court excluded evidence obtained during the search under the rationale that in addition to deterrence, an important purpose of the exclusionary rule of the Washington constitution is to protect the integrity of the judicial system by generally not admitting evidence where it has been illegally obtained by government actors. (See also State v. Abuan, 161 Wn. App. 135 (Div. II, 2011), at pages 11-15 below.)

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BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) CONFESSION BY INEXPERIENCED 17-YEAR-OLD SUSPECT IN MASS MURDER CASE AGAIN HELD INVOLUNTARY BY MAJORITY OF NINTH CIRCUIT WHERE, AMONG OTHER THINGS, (1) OFFICERS SIGNIFICANTLY DOWNPLAYED THE MIRANDA WARNINGS, (2) QUESTIONED THE SUSPECT THROUGH THE NIGHT FOR 12 HOURS STRAIGHT, (3) FOR AN EXTENDED PERIOD CONTINUED ASKING HIM ESSENTIALLY THE SAME QUESTIONS OVER AND OVER DESPITE HIS SILENCE, AND (4) TOLD HIM NUMEROUS TIMES THAT HE "HAD TO" ANSWER THEIR QUESTIONS – In Doody v. Ryan, ___F.3d ___ , 2011 WL 1663551 (9th Cir. 2011) (decision filed May 4, 2011), an 8-3 majority of the Ninth Circuit rules along the same lines as a 3-judge Ninth Circuit panel ruled in the same case, then titled Doody v. Shriro, 548 F.3d 847 (9th Cir. 2008) (decision filed November 20, 2008) **March 09 LED:04**. The May 4, 2011 Ninth Circuit majority opinion in Doody determines that defendant Doody was not adequately advised of his Miranda rights and that his confession to mass murder was involuntary for additional reasons.

Additional procedural history in the case is as follows: On March 25, 2010, an 8-3 majority of an 11-judge Ninth Circuit panel affirmed the 3-judge panel's decision that was reported in the **March 2009 LED** beginning at page 4; later in 2010, the U.S. Supreme Court directed the Ninth Circuit to reconsider the Doody case in light of the U.S. Supreme Court decision regarding adequacy of Miranda warnings in Florida v. Powell, 130 S. Ct. 1195 (2010) **April 10 LED:06**; the May 4, 2011 Ninth Circuit 8-3 decision is the Ninth Circuit's response to the U.S. Supreme Court's remand of the case. The Ninth Circuit has now remanded the case to the Arizona

courts for defendant Doody's possible retrial in a mass murder case. It is possible that the State of Arizona will again seek U.S. Supreme Court review of the May 4, 2011 Ninth Circuit decision.

To save LED space, we will not provide a detailed description of the opinions in the Ninth Circuit's May 4, 2011 decision. The majority opinion in that decision is along the lines of the original 3-judge panel's decision that we addressed in the **March 2009 LED**. The majority opinion takes the interrogating officers to task for their taped questioning of an inexperienced 17-year-old suspect where, among other things, the officers: (1) significantly downplayed the Miranda warnings by saying such things as the suspect should not take the warnings out of context, and that the warnings were being given as much for the officers' protection as for the suspect's protection; (2) questioned the 17-year-old suspect (who had not had previous contact with the criminal justice system) through the night for 12 hours straight; (3) continued to question him despite his long periods of not answering repeated questions over and over; (4) told him numerous times that he "had to" answer their questions. We remind readers that, per the internet access information that we provide at the end of each month's LED, decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions."

(2) CIVIL RIGHTS ACT DECISION: FEDERAL ACT PROTECTING RELIGION IN INSTITUTIONS APPLIES TO COUNTY COURTHOUSE HOLDING FACILITY, SO U.S. DISTRICT COURT MUST ADDRESS WHETHER ACT WAS VIOLATED BY ORDERING MUSLIM WOMAN TO REMOVE HEADSCARF – In Khatib v. County of Orange, 639 F.3d 898 (9th Cir. 2011) (decision filed March 15, 2011), an 11-judge Ninth Circuit panel unanimously rejects a California county's argument that its county courthouse holding facility is not an institution covered by the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) adopted by Congress to protect institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion. This decision does not address whether the county holding facility staff members were justified under the balancing test of the reasonable accommodation provisions of the RLUIPA in ordering a practicing Muslim to remove her hijab, or headscarf, while she was briefly being held in a county courthouse holding facility.

Result: Reversal of U.S. District Court (Central District of California) grant of summary judgment to the County of Orange; case remanded for trial on the issue of whether the County violated the rights of the Muslim woman of the RLUIPA by not accommodating her religious concerns about removing her scarf.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

SPLIT COURT DOES NOT RESOLVE WHETHER THE CONCEPT OF "ATTENUATION" IS PART OF THE EXCLUSIONARY RULE OF WASHINGTON'S CONSTITUTION – In State v. Eserjose, ___Wn.2d ___, 2011 WL 2571350 (2011) (decision filed June 30, 2011), the Washington Supreme Court issues a 3-1-1-4 decision that affirms the admissibility of a confession and the burglary conviction, but, because of the split in voting does not resolve the question of whether Washington's constitution, article I, section 7, allows consideration of the concept of "attenuation" of the effect of unconstitutional actions by law enforcement officers.

Sheriff's office deputies developed probable cause to arrest defendant Eserjose for burglary. The deputies did not seek a search or arrest warrant. They went to Eserjose's father's home, where Eserjose resided. The father consented to the deputies' entry into the house. The

deputies became concerned when Eserjose and a suspected accomplice did not immediately come downstairs to talk to them. At that point, the deputies unlawfully exceeded the scope of the consent to entry by going upstairs to find and arrest Eserjose and the suspected accomplice.

The deputies took the two suspects outside and placed them in separate patrol cars. A deputy gave Eserjose Miranda warnings before transporting him to the police station, but the deputy did not ask Eserjose any questions at that time. After Eserjose was transported to the sheriff's office, he was Mirandized, and, after initial denials, he ultimately confessed – after being told that his alleged accomplice had confessed.

Prior to trial, Eserjose moved to suppress his confession based on the unlawfulness of the deputies' warrantless arrest inside his residence (the State conceded in this case that the arrest was unlawful because the officers exceeded the scope of the consent to their entry of the residence). The superior court denied his motion to suppress. The denial was based on the United States Supreme Court's decision in New York v. Harris, 495 U. S. 14 (1990). In Harris, the U.S. Supreme Court limited the impact of the Fourth Amendment exclusionary rule under circumstances somewhat similar to those in Eserjose. In simple terms, Harris held that where – (1) probable cause supported a warrantless arrest (which was unlawful only because it was made inside a residence and not supported by a warrant, consent or exigent circumstances), and (2) the arrestee later gave a Mirandized stationhouse confession (at which point he was lawfully in custody based on the pre-arrest probable cause) – there was, as a matter of law, no illegality connected to his confession, and hence there was no basis for application of the Fourth Amendment exclusionary rule.

On review of the superior court decision in Eserjose, two other members of the Washington Supreme Court (Justices Stephens and James Johnson) join in the lead opinion authored by Justice Alexander) that (1) endorses a highly fact-based rule that would take a more exclusionary tack than did the U.S. Supreme Court in Harris, but (2) concludes that the confession is admissible because the causal link between the illegality and the confession was sufficiently "attenuated" (i.e., significantly weakened if not eliminated): (a) by the fact that the constitutional violation was not flagrant or egregious, (b) by the passage of time before questioning, (c) by the change of scene prior to any questioning, (d) by the intervening Mirandizing, and (e) by the apparent fact that the primary impetus for Eserjose's confession was his accomplice's confession, not anything related to the warrantless residential arrest.

The lead opinion distinguishes State Winterstein, 167 Wn.2d 620 (2010) **Feb 10 LED:24** (in which the Washington Supreme Court held in a 6-3 vote that, unlike the Fourth Amendment, article I, section 7 of the Washington constitution does not contain an inevitable discovery exception to its exclusionary rule); and State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:09** *(*in which the Washington Supreme Court held in a unanimous decision that the exclusionary rule of article I, section 7 of Washington constitution does not contain a case-law-based good faith exception).

Justice Fairhurst joins only in the result of the lead opinion, and she does not author her own opinion or join in any other opinion.

Justice Madsen writes a lone concurring opinion in which she appears to argue that the Washington constitution's exclusionary rule should be interpreted as requiring the same approach as followed by the U.S. Supreme Court majority opinion in Harris.

Justice Charles Johnson writes a dissenting opinion joined by Justices Chambers, Owens, and Sanders (Justice Sanders is sitting in a temporary capacity on cases on which he heard oral argument before Justice Wiggins was sworn into office on the Supreme Court on January 7, 2011). The dissent's proposed rule for the factual context of this case apparently would exclude any and all statements or evidence obtained from a person during his or her continuous custody following an unconstitutional arrest (whatever the nature of the constitutional violation).

Result: Affirmance of Kitsap County Superior Court conviction of James Robert Eserjose for second degree burglary.

LED EDITORIAL COMMENT: It would have been nice if a majority of the Washington Supreme Court had adopted the balanced approach of the U.S. Supreme Court's ruling in the Harris case. In light of the varying opinions authored by Washington Supreme Court justices in Eserjose, it seems unlikely that the current Washington Supreme Court will adopt the Harris approach.

For law enforcement officers of course, the most important thing – admittedly easier said than done, particularly for Washington officers – is to try to follow the substantive arrest-search-and-seizure case law rules and thus avoid getting into circumstances where the exclusionary rule might be applied.

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WASHINGTON STATE COURT OF APPEALS

DEPUTY SHERIFF'S COMPUTER CHECK OF JAIL VISITOR'S NAME FOR OUTSTANDING WARRANTS AND DRIVER LICENSE INFORMATION DID NOT VIOLATE HER STATE OR FEDERAL CONSTITUTIONAL PRIVACY RIGHTS; ALSO, EVIDENCE HELD SUFFICIENT TO SUPPORT HER CONVICTION FOR POSSESSION OF METHAMPHETAMINE

State v. Hathaway, 161 Wn. App. 636 (Div. II, 2011) (decision filed May 3, 2011)

Facts: (Excerpted from Court of Appeals opinion)

> On July 16, 2008, Hathaway visited an inmate at the Jefferson County jail. Because the jail was short-staffed that day, [a sheriff's deputy] helped screen visitors. Specifically, [the deputy] ran a computer check of visitor names looking for outstanding warrants per the jail's standard visitor screening procedures; this standard check also provides driver licensing information. When [the deputy] learned that Hathaway's driving privileges were suspended, he asked jail staff to advise him if she left by driving a vehicle.
>
> While sitting in his patrol car, [the deputy] learned from jail staff that Hathaway had entered a car. [The deputy] spotted the car, noted only a driver occupied it, and followed the car out of the jail parking lot. [The deputy] activated his patrol lights and siren to perform a traffic stop. Despite opportunities to pull over, Hathaway made three turns and then pulled over "[l]ess than a mile" from where [the deputy] had turned on his patrol lights.
>
> [The deputy] approached the vehicle and when he asked Hathaway for her driver's license, she said she did not have it with her. [The deputy] confirmed

> with his dispatch that Hathaway's driver's license had been suspended and he arrested her. He handcuffed her and walked her to his patrol car where he performed a search of her person incident to arrest. While [the deputy] searched Hathaway's legs, he heard a "tink" like "something hitting the ground." He looked up and saw a small clear plastic vial containing a white crystalline substance about six inches from Hathaway's foot. At trial, [the deputy] testified that the vial was underneath and behind his patrol car's rear wheel such that he would have run over it if it had been there before the stop. [The deputy] Hathaway in his patrol car and read her Miranda rights. When he asked her about the vial, Hathaway replied, "I don't know, it's not mine." A forensics lab later confirmed that the vial contained 0.47 grams of methamphetamine.

Proceedings: Hathaway was convicted by a jury on a charge of possession of a controlled substance.

ISSUES AND RULINGS: 1) Did the deputy violate Hathaway's U.S. or Washington constitutional privacy rights when he did a random computer check for driver license information (and for warrants) during her visit to the jail? (ANSWER BY COURT OF APPEALS: No);

2) In light of the evidence indicating that Hathaway tried to toss the methamphetamine while the deputy was frisking her, is the evidence sufficient to support Hathaway's conviction for possession of a controlled substance even though the methamphetamine was not on her person when the deputy discovered it? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Jefferson County Superior Court conviction of Jennifer Joy Hathaway for unlawful possession of methamphetamine.

ANALYSIS:

1) No privacy rights in driver's license record

The Hathaway Court determines that the Washington Supreme Court decision in State v. McKinney, 148 Wn.2d 20 (2002) **Jan 03 LED:05** is on point factually and is controlling on the privacy issue under article I, section 7 of the Washington constitution. The Court also explains that Fourth Amendment case law likewise permits random law enforcement checking of driver license information and similar government databases.

2) Sufficiency of the evidence

The Hathaway Court's analysis of the sufficiency-of-the-evidence issue is as follows:

> Hathaway next argues that the State failed to prove beyond a reasonable doubt that she constructively possessed methamphetamine. The State responds that it proved Hathaway's actual possession of methamphetamine. We agree with the State.
>
> . . .
>
> Possession can be actual or constructive. Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item.

> Here, the evidence established Hathaway's actual possession of the methamphetamine. [The deputy] testified that, while he frisked Hathaway, he heard a "tink" sound and then noticed a vial of methamphetamine on the ground inches away from her foot. [The deputy] also testified that the vial was in a position near his patrol car's tires and that he would have driven over the vial if it had been on the ground before the traffic stop. Based on this testimony, the jury could reasonably infer that, when [the deputy] was not watching Hathaway during the frisk, she removed the vial of methamphetamine from somewhere on her person and dropped it. Sufficient evidence supports Hathaway's unlawful possession of a controlled substance conviction.

[Some citations omitted]

"RESIDENTIAL BURGLARY": TOOL ROOM OF APARTMENT BUILDING HELD TO BE PART OF A "DWELLING"

State v. Neal, 161 Wn. App. 111 (Div. I, 2011) (decision filed April 11, 2011)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> A maintenance worker at an apartment building discovered Troy Neal inside the tool room. Neal was putting tools into several bags. When apprehended by police, he had in his possession a stolen credit card and a pill bottle containing crack cocaine. He was convicted, among other charges, of residential burglary.

ISSUE AND RULING: For purposes of the burglary statutes of chapter 9A.52 RCW and RCW 9A.04.110(7)'s incorporated definition of "dwelling," is a tool room in an apartment building part of a dwelling? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court conviction of Troy Lamont Neal for residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> One of the elements of residential burglary is entry into a "dwelling." Neal contends there was insufficient evidence to support this element because no one lived or slept in the tool room.
>
> . . . .
>
> Under the criminal code, "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). Dwelling is defined as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7).
>
> Neal argues that the statutory definition of "dwelling" means that the part of the building entered must be used for lodging. We disagree. We have already held that a garage attached to a home was part of a "dwelling" because it was a portion of a building used as lodging. State v. Murbach, 68 Wn. App. 509 (Div. III, 1993) **May 93 LED:16**.

> Neal asks that we decline to follow Murbach. He contends it is inconsistent with the "last antecedent rule." Under that rule, "qualifying or modifying words and phrases refer to the last antecedent." Thus, Neal argues the lodging requirement must be applied only to the "portion thereof" language, and accordingly, it is the "portion" of the building (in this case, the tool room) that must be used for lodging. But under the corollary to the last antecedent rule, the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. The application of the corollary rule leads to the conclusion that a "dwelling" may be a building or structure used for lodging, or it may be any portion of a building where the portion is used for lodging.
>
> Neal contends this interpretation produces absurd results. He asks, if Quasimodo sleeps in the organ loft of Notre Dame, does the entire cathedral become a dwelling because some small portion is used for his lodging? As the State responds, the answer is no, under a proper interpretation of the statute and assuming France's law on burglary is the same as Washington's. Because the cathedral as a whole is not used or ordinarily used for lodging, a person who burglarizes the nave or the sacristy of the cathedral is not guilty of residential burglary. But a person who burglarizes Quasimodo's loft is guilty of residential burglary because that portion of the cathedral is used for lodging. This is not an absurd result.
>
> In this case, the tool room is not analogous to Quasimodo's loft because no one was sleeping in it. Instead, the building itself, unlike the cathedral, was used for lodging. It was an apartment building. Because Neal entered a building used for lodging, the evidence was sufficient to convict him of residential burglary.

[Some citations omitted]

ISSUES OF 1) WAIVER/FALURE-TO-PRESERVE CONSTITUTIONAL ARGUMENTS, 2) FRISK, 3) VEHICLE SEARCH INCIDENT TO ARREST, AND 4) IMPOUND-INVENTORY-THEORY TOUCHED ON AND RESOLVED AGAINST THE STATE IN A 2-1 DECISION

INTRODUCTORY LED EDITORIAL COMMENT: The 2-1 decision of the Court of Appeals digested below does not break any new ground in Fourth Amendment or Washington article I, section 7 case law. The main elements of the decision merely: (1) answer an authority-to-frisk question that is easy to answer in light of the facts, and (2) reflect the split of opinions among judges on Division Two of the Court of Appeals on constitutional issues of waiver and vehicle search incident to arrest that had developed since the U.S. Supreme Court decided Arizona v. Gant, 556 U.S. 332 (2009) June 09 LED:13.

After Division Two issued the Abuan decision digested below, the Washington Supreme Court resolved the change-in-law-based, vehicle-search-incident waiver issue against the State in the Robinson and Mullin decisions digested in the July 2011 LED beginning at page 19.

The Washington State Supreme Court is also currently reviewing, in the Snapp and Wright cases, the issue of what triggers law enforcement authority under article I, section 7 of the Washington constitution to conduct a vehicle search incident to arrest. See the notes in the November 2010 LED at pages 2-3 and in the April 2011 LED at page 13. The

Court heard argument in Snapp and Wright in May. Whatever decision the Court makes in Snapp and Wright, that decision almost certainly will not support the officers' decision in Abuan to conduct a vehicle search under the facts before them. In saying this, however, we of course do not suggest criticism of the officers in Abuan. They did not have a crystal ball in 2007 that could tell them that, a few years later, the U.S. and Washington Supreme Courts would change the rules for vehicle searches incident to arrest.

State v. Abuan, 161 Wn. App. 135 (Div. II, 2011) (decision filed April 12, 2011(

Facts: (Excerpted from Court of Appeals opinion)

> [In August of 2007], Tacoma Police Officers [A] and [B] initiated a traffic stop of a red Chevrolet Corsica with expired registration tabs. Neither [officer] noted or recalled any furtive movements by the vehicle's occupants as they pulled it over. According to [Officer A], the vehicle's occupants were "cooperative [and] cordial" and there was "[n]o indication of drugs or alcohol or anything." The Corsica's driver identified himself as Raymond Howell. After Howell stated that he did not have a driver's license or other form of identification, [Officer A] removed him from the vehicle and placed him in the back of the patrol car. After running a records check on Howell's name, [Officer B] discovered that Howell had a suspended driver's license and informed Howell that he was under arrest for driving with a suspended license.
>
> While [Officer A] was contacting and removing Howell from the vehicle, [Officer B] contacted Abuan, the passenger. [Officer B] did not testify to any furtive movements by Abuan before or while the officers pulled the vehicle over, nor at any point after the vehicle was pulled over, did [Officer B] lose sight of Abuan or observe him make any furtive movements. After [Officer A] removed Howell from the vehicle, [Officer B] asked Abuan to step out of the vehicle so that the officers could search incident to Howell's arrest. When Abuan exited the vehicle, [Officer B] told him that he was not under arrest but that [Officer B] wanted to search Abuan for weapons. As [Officer B] began to search Abuan, Abuan stated, "I ain't going to lie to you. I have a little bit of weed," and began reaching for his "[r]ight pants or shorts pocket." [Officer B] prevented Abuan from reaching into his pocket, handcuffed him, removed the suspected marijuana from Abuan's pocket, and placed him beside Howell in the back of the patrol car. [Officer A] informed Abuan of his Miranda rights.
>
> [Officer B] conducted a search of the vehicle incident to Howell's arrest. [Officer B] discovered a 9 millimeter handgun under the driver's seat. Neither [officer] could see the gun from outside the vehicle. Because they had read the police report on [a drive-by shooting that occurred two days earlier where shots were fired at the drive-by vehicle] and knew that law enforcement had recovered 9 millimeter shell casings from the scene, [the two officers] began to inspect the vehicle more closely. They discovered that something had recently broken out the vehicle's rear passenger side brake light and had caused a small indentation in the light's inner, metal casing. According to [Officer B], the damage was consistent with a gunshot.
>
> Abuan noticed the officers examining the vehicle and explained that he had been riding in it with a female cousin on another occasion when someone had fired two

> shots at them. Abuan also admitted to membership in the Native Gangster Bloods (NGB), a Bloods-affiliated gang and showed the officers his tattoos and his red belt and shoes, all of which indicated membership in the Bloods gang. Abuan stated that Howell was a "wannabe" of the "Morton Blocc Crips." Law enforcement impounded the vehicle for evidence processing.

[Footnotes omitted]

Proceedings below: In the Superior Court, Abuan did not challenge the frisk or the search of his vehicle. Abuan was convicted in a Superior Court jury trial of drive by shooting and two counts of second degree assault in relation to the drive by shooting incident two days earlier than the traffic stop briefly noted in the excerpt above [**LED EDITORIAL NOTE: To save space, we omitted the Court's factual description of the drive by shooting incident, as well as the Court's description of the procedural background and the Court's analysis on that issue.**]

ISSUES AND RULINGS: 1) Did Abuan waive any challenge to the frisk by not raising the issue at superior court? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority);

2) Was the frisk of Abuan justified under the Washington and federal constitutions? (ANSWER BY COURT OF APPEALS: No, at the time of the frisk, the officers did not have reasonable and articulable suspicion that Abuan was armed and dangerous – the dissenting opinion does not address this issue);

3) Did Abuan waive any challenge to the search of the vehicle incident to arrest by not raising the issue at superior court? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority);

4) Was the search of the vehicle incident to arrest unlawful under both the Washington and federal constitutions? (ANSWER BY COURT OF APPEALS: Yes – the dissenting opinion does not address this issue);

5) Do the good faith or inevitable discovery exceptions to the exclusionary rule apply under the Washington constitution, article I, section 7, and does either exception apply here? (ANSWER BY COURT OF APPEALS: No, the exceptions do not apply under the Washington constitution – the dissenting opinion does not address this issue);

6) Can the vehicle search be justified as an impound-inventory search? (ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority)

Result: State loses; reversal of Pierce County Superior Court convictions of Kevin Michael Abuan for drive by shooting, and two counts of second degree assault with firearm enhancements; remand to Superior Court to dismiss one of the assault convictions with prejudice (under a sufficiency-of-the-evidence rationale not addressed, except in the brief note immediately below, in this LED entry); re-trial is possible on the other charges.

Note regarding sufficiency-of-the-evidence issue: The sufficiency-of-the-evidence issue on one of the assault convictions centers on the concept of "transferred intent." The majority opinion agrees with the defendant and disagrees with the dissenting opinion in interpreting the Washington Supreme Court decision on "transferred intent" in State v. Elmi, 166 Wn.2d 209 (2009) **Aug 09 LED:15.**

ANALYSIS:

1) No waiver by defense by failing to raise frisk issue at Superior Court

The majority opinion concludes that Abuan is allowed to raise the frisk issue even though he did not raise the issue in the Superior Court. The dissent disagrees. This LED entry will not address the analysis on this issue, other than to note (A) that this waiver issue is different from the post-Gant, change-in-the-law issue addressed under Issue 3, and (B) we think that most appellate courts would have ruled that Abuan waived his challenge to the frisk by not raising this argument in the Superior Court.

2) No justification for frisk

The key part of the majority opinion's analysis on the frisk-justification issue is as follows:

> Absent a reasonable, articulable, and individualized suspicion that a passenger is armed and dangerous or independently connected to illegal activity, the search of a passenger incident to the arrest of the driver is invalid under article I, section 7 [of the Washington constitution]. The level of articulable suspicion required to justify the search or seizure based on suspicion of criminal activity is a substantial possibility that criminal conduct has occurred or is about to occur.
>
> . . . .
>
> Here, the officers arrested the driver, Howell, for driving with a suspended license. Neither officer testified that they suspected Abuan was armed or engaged in criminal activity before beginning to search him. To the contrary, [Officer A] testified that Abuan was "cooperative and cordial" and that there was "[n]o indication of drugs, alcohol or anything." [Officer B] testified that he could not recall any furtive movements by Aguan before pulling the car over.
>
> The officers' testimony affirmatively establishes the lack of any reasonable and articulable justification for searching Abuan.

[Citations and some internal quotation marks omitted]

The dissenting opinion does not address the frisk-justification question.

3) No waiver by defense of challenge to vehicle search incident to arrest

The majority opinion concludes that, under article I, section 7 of the Washington constitution, because the law changed after his case was on appeal, Abuan is allowed to raise the vehicle-search-incident issue even though he did not raise the issue at Superior Court. The dissent disagrees. This LED entry will not address the analysis in the majority or dissenting opinions on this issue. But we do note that this issue appears to have been finally and fully resolved against the state by the Washington Supreme Court decision (decided two days after Abuan was decided by the Court of Appeals) in the consolidated cases of State v. Robinson/State v. Mullin, ___Wn.2d ___, 2011 WL 1434607 (2011) **July 11 LED:19.**

4) Unlawful vehicle search incident to arrest

The majority opinion concludes that driving while license suspended is not the type of crime for which law enforcement officers can reasonably expect to find evidence of the crime in the vehicle (at least under the facts of this case). Therefore, a search incident to arrest was not

justified under the Fourth Amendment test first announced by the U.S. Supreme Court in Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**. Because the Washington constitution cannot provide less protection to people than the federal constitution's Fourth Amendment, a search incident to arrest was not authorized under the Washington constitution, article I, section 7. The majority opinion also addresses the question of whether the Washington constitution is more restrictive on the trigger to law enforcement authority to search vehicles incident to arrest of occupant**. [LED EDITORIAL NOTE: As noted in the LED Introductory Editorial Comment to this entry above, the Washington Supreme Court is currently addressing in two vehicle search cases the question of whether the Fourth Amendment and Washington constitutions differ in this regard. To save space and avoid muddying the waters in a confusing area of law, we will not address the Abuan Court's analysis in this LED entry.]**

The dissenting opinion does not offer an opinion on the substantive law related to the vehicle search incident issue.

5) Inapplicability of good faith and inevitable discovery exceptions to application of the exclusionary rule under Washington constitution

The State apparently argued in this case that, for two independent reasons, the evidence should not be excluded based on Gant or its offspring: (1) the officers acted in good faith reliance on the case law existing at the time they did the search in 2007; and (2) it was inevitable that the evidence in the car would be found, because the car was ultimately determined to have been used in a drive-by shooting and would have been impounded and inventoried as evidence itself of a crime. The majority opinion rejects this argument by stating that under article I, section 7 of the Washington constitution neither of the State's proffered exceptions to the exclusion rule are valid:

> [The Washington] Supreme Court has rejected both the good faith and inevitable discovery exceptions [to exclusion] as incompatible with the article I, section 7 exclusionary rule. State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:09** [no good faith exception to exclusion of evidence remedy for constitutional violation]; State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24** [no inevitable discovery exception to exclusion of evidence remedy].

6) No support for application of impound-inventory exception to warrant requirement

The majority opinion notes that the dissenting opinion suggests that the vehicle search can be justified under the impound-inventory exception to the search warrant requirement. Under some circumstances, vehicles may be impounded and inventoried without a search warrant. The majority rejects this idea because, among other things, the State did not argue this theory at any point, and also because the factual record and briefing of the parties do not support that the vehicle search was done for other than criminal investigatory purposes. The inventory exception requires, among other things, that the primary purpose of inventorying is not criminal investigation.

EVIDENCE HELD SUFFICIENT TO MEET "INJURY" AND "IMPAIRMENT" ELEMENTS OF SECOND DEGREE ASSAULT UNDER RCW 9A.36.021(1)(a) AND RCW 9A.04.110(4)(b)

State v. McKague, 159 Wn. App. 489 (Div. II, 2011) (decision filed January 19, 2011)

Facts: (Excerpted from Court of Appeals majority opinion)

> On October 17, 2008, Jay Earl McKague stole a can of smoked oysters from Kee Ho Chang's grocery store in Olympia. When Chang tried to "grab" McKague in the store's parking lot, McKague repeatedly punched Chang, who fell to the ground. As Chang fell to the ground, McKague hit Chang several more times before jumping into a car and fleeing. When Chang "tr[ied] to get up," he "got very dizzy," and "for a while [he] couldn't get up." Eventually, Chang was able to stand up. [A police officer], who arrived shortly after the incident, described the left side of Chang's face as "extremely puffy." According to [a detective], who arrived at the scene and responding to the police dispatch, Chang "app[eared] injured[] on the left side of his face and on the back of his head."
>
> An emergency room medical evaluation documented Chang's injuries, which included a concussion, a scalp contusion, and neck and shoulder pain. A computerized axial tomography scan (CT scan) showed a possible occult fracture of Chang's facial bones. [*Court's Footnote: "The term occult fracture is used to describe an injury to bone that is clinically suspected, but cannot be identified on initial radiographs."] [Citation and internet link omitted from this LED entry*.] On the day of the incident, law enforcement officers took photographs of Chang that showed bruising and swelling around his left eye, redness and swelling of his left cheek, lacerations on his arm, a contusion on his head, and blood on his scalp. The emergency room physician prescribed Vicodin for the pain and cautioned Chang to limit his activities for the next two weeks. Chang's private physician prescribed Chang anti-inflammatory medication. Three days later, law enforcement officers took photographs of Chang's face that showed bruising remaining around Chang's left eye.

[One footnote omitted]

Proceedings below: A jury convicted McKague of second degree assault and third degree theft.

ISSUE AND RULING: Is there sufficient evidence of "substantial bodily harm" as defined in RCW 9A.04.110(4)(b) to support the jury's verdict that McKague intentionally assaulted Chang and thereby recklessly inflicted substantial bodily harm within the meaning of RCW 9A.36.021(1)(a)? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, with Judges Hunt and Quinn-Brintnall in the majority and Judge Armstrong in dissent).

Result: Affirmance of Thurston County Superior Court conviction of Jay Earl McKague for second degree assault and third degree theft, and affirmance of his sentence to life without parole as a persistent offender (this was his "third strike").

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

> A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence.
>
> A conviction for second degree assault requires the State to prove beyond a reasonable doubt that a defendant intentionally assaulted another and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). RCW 9A.04.110(4)(b) defines "substantial bodily harm" as:
>
> > bodily injury which involves [1] a temporary but substantial disfigurement, or [2] which causes temporary but substantial loss

> or impairment of the function of any bodily part or organ, or [3] which causes a fracture of any bodily part.

McKague argues that the State failed to prove beyond a reasonable doubt any of these three possibilities of substantial bodily harm.

Specifically, McKague contends that: (1) Chang's scalp contusion and "strained shoulder" did not rise to the level of "temporary but substantial disfigurement;" (2) Chang's "concussion without loss of consciousness" did not cause "any lack of function or impairment," and (3) Chang did not suffer a fracture because the record only establishes a "potential occult fracture." Based on this, McKague argues that the record contains insufficient evidence to convict him of second degree assault. This argument fails.

A. Bodily Injury Involving A Temporary But Substantial Disfigurement

McKague contends that Chang's scalp contusion and "strained shoulder" do not count as a "temporary but substantial disfigurement" under RCW 9A.04.110(4)(b). The dictionary defines "substantial" as "something having substance or actual existence," "something having good substance or actual value," "something of moment," and "an important or material matter, thing, or part." Webster's Third New International Dictionary 2280 (2002).

Even assuming, without deciding, that McKague is correct, his argument fails: Taking the facts in the light most favorable to the State post-conviction, a rational trier of fact could conclude that McKague inflicted other injuries besides the scalp contusion and "strained shoulder," which other injuries qualified as a "temporary but substantial disfigurement" under RCW 9A.04.110(4)(b). And we further note that visible bruising itself rises to the level of temporary substantial disfigurement. See State v. Hovig, 149 Wn. App. 1 (Div. II, 2009) **May 09 LED:21** ("serious . . . red and violet teeth-mark" bruising that lasted for 7 to 14 days constituted "substantial bodily injury"); see also State v. Ashcraft, 71 Wn. App. 444 (Div. I, 1993) (bruises that resulted from being hit by a shoe were "temporary but substantial disfigurement").

> [The first responding police officer] testified that when he arrived at the scene, he observed that Chang "obviously" had injuries on the left side of his face. [The officer] described Chang's face as "extremely puffy" and bruised, a bump on the back of Chang's head, and that Chang "looked like he was affected, affected by [the] blows." [The detective] confirmed that the photographs taken on the day of the incident and admitted into evidence at trial accurately reflected Chang's injuries that day. Based on these contemporaneous photos, [the detective] described Chang's injuries as swelling around his eye causing it to be "a little bit shut or closer shut than normal," swelling of his cheek, an abrasion on his left cheek, and a laceration on his head. [The detective] also testified that the photographs of Chang taken three days later showed injuries that were "consistent with that which occurred" during the incident with McKague, and that the bruising around Chang's eye had already begun to turn yellow.

Viewing the above facts in a light most favorable to the State, a rational trier of fact could find that McKague inflicted on Chang a "bodily injury which involves a temporary but substantial disfigurement." RCW 9A.04.110(4)(b).

B. Temporary Substantial Impairment Of Bodily Part Or Organ Function

McKague next contends that Chang's "concussion without a loss of consciousness" did not cause "any lack of function or impairment." This argument also fails. Viewed in a light most favorable to the State, the evidence establishes that a rational trier of fact could find that several of Chang's injuries, including his concussion, constituted a bodily injury that "cause[d] temporary but substantial loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(b).

Chang testified that, immediately after McKague punched him, he was so dizzy that for "for a while," he could not stand up. Based on Chang's inability to stand "for a while," let alone walk, after McKague had repeatedly punched him and knocked him down, a rational trier of fact could find a "temporary but substantial loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(b).

Additionally, [the first responding police officer] testified that when he arrived at the scene, Chang appeared disoriented and "was just a little bit off." The medical report from Chang's emergency room visit the day of the incident explained that Chang had a concussion without loss of consciousness. Chang's discharge papers included warnings about potentially dangerous symptoms for which Chang should be vigilant, complications related to his concussion, instructions to help monitor and expedite his recovery, and restrictions on various life activities over the next day and subsequent two-week period. For example, Chang was precluded from drinking alcohol, operating machinery, driving, heavy lifting and straining for at least 24 hours, and participating in contact sports for at least two weeks and then only after receiving doctor approval.

The jury could also reasonably infer that Chang had a temporary brain impairment based on the concussion that he suffered and on Officer Samuelson's testimony that Chang seemed "a little bit off" when answering questions the night of the assault, compared to their previous contacts. According to Chang's medical records, a concussion produces both short and long-term negative health effects on the body. Chang's medical records also included the following patient discharge instructions describing and relating to his concussion:

> Concussion is a head injury that causes a transient loss of consciousness, without any serious brain lesion, injury, or complications. Most head injuries do not cause any serious problems and get better within several days. A Concussion may cause a moderate headache and loss of memory surrounding the head injury event. You may experience weakness, dizziness, nausea, concentration difficulties, and depression for up to a week or more after the injury. This post-injury state is called a **post-concussion syndrome** and usually gets better with bed rest and mild pain medicine. If any of these symptoms last for more than a week, you will need further medical attention. See your doctor or return to emergency if symptoms last longer than one week. (Emphasis added by the Court)

[Court's footnote: *A general understanding of the term "concussion" as it relates to brain injuries is "a jarring injury of the brain resulting in disturbance of cerebral function and sometimes marked by permanent damage." Webster's Third New International Dictionary 472 (2002) (emphasis added). Chang's medical report suggests that concussions are accompanied by loss of consciousness. The Mayo Clinic states that concussions have a range of significance but all "temporarily interfere with the way your brain works" and "injure] your brain," even if not resulting in "a loss of consciousness." Other major complications of a concussion may include "[p]ostconcussion syndrome," a term briefly discussed in Chang's medical files, which "causes concussion symptoms to last for weeks or months." Furthermore, a history of a single concussion increases one's risk of future concussions and doubles the risk for developing epilepsy within five years of brain injury. In other words, a person who has suffered a concussion has suffered permanent bodily harm making him more vulnerable to future brain injury.*] *[Internet citations and links omitted from this LED entry.]*

This definition identifies headaches, memory loss, and at least five brain complications that can last for an extended period of time; the last of these is classified as a medical "syndrome." Because the emergency room affirmatively diagnosed Chang with a concussion, the jury could rely on these effects of a concussion to determine that Chang's concussion rose to the level of substantial bodily injury.

Chang's medical report also reflected that Chang experienced neck and shoulder pain. He received a four-day prescription for Vicodin for his severe pain. And he testified that he had "very severe" pain throughout his neck and shoulder during the week after the incident, for which his private doctor prescribed an anti-inflammatory medication, and that his neck and shoulder pain subsided but persisted for two to three months. Chang's months of shoulder and neck pain also constitute a substantial bodily injury; although pain is no longer an enumerated independent basis for substantial bodily injury, the statutory definition of "substantial bodily injury" does not preclude consideration of pain and its effects. Laws of 1988, ch. 158, § 1. Thus, the jury could reasonably infer that Chang had a loss or impairment of the use of his arm and shoulder function related to his severe neck and shoulder pain that lasted for two to three months.

Viewing the evidence in the light most favorable to the State, a rational trier of fact could find, beyond a reasonable doubt, that Chang suffered "a bodily injury . . . which causes temporary but substantial loss or impairment of the function of any bodily part or organ" as a result of McKague's intentional assault. RCW 9A.04.110(4)(b).

C. Bodily Injury Causing A Fracture Of Any Bodily Part

Finally, McKague argues that Chang did not suffer a fracture because the record establishes only a "potential occult fracture." Because we hold that a rational trier of fact could find substantial bodily injury under the disfigurement or impairment bases, we need not and do not reach the fracture issue. We note, however, that the record contains some evidence that Chang may have suffered a fracture:

> A physician concluded that the results of a CT scan performed on Chang the day of the incident "potentially indicat[ed] [an] occult fracture."

[Record, briefing, and internet citations omitted; some case citations revised]

DISSENT: Judge Armstrong's dissent argues that the evidence is insufficient to meet the statutory definitions. It appears that Judge Armstrong would require some medical testimony in light of the ambiguity of the evidence in this case.

LED EDITORIAL COMMENT: It is unusual for an appellate court, as the majority in McKague does, to rely heavily on a medical dictionary that is not evidence in a case (or so it appears from our reading of the decision) to fill in gaps in the evidence. Judge Armstrong may have a point that medical evidence was needed to fill in these gaps.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) CREDIBILITY PRONG OF 2-PRONGED AGUILAR-SPINELLI TEST FOR PROBABLE CAUSE MET BY REGISTERED SEX OFFENDER-INFORMANT; ALSO, DEFECTIVE SERVICE OF SEARCH WARRANT IS HELD NOT PREJUDICIAL UNDER FACTS OF CASE – In State v. Ollivier, 161 Wn. App. 307 (Div. I, 2011) (decision filed April 18, 2011), Division One of the Court of Appeals rejects the arguments directed at a search warrant and its execution by a defendant convicted of possessing child pornography.

Defendant Ollivier was a registered sex offender with a prior conviction of first degree child molestation. He was living with two roommates who were also registered sex offenders. One of the roommates gave a taped interview to police after that roommate was arrested on a community custody violation. The roommate told police in some detail about how defendant had recently shown him a video of a young girl having sexual relations with a young boy, plus additional pictures of young girls with no breast development. Police obtained a search warrant for Ollivier's computer and living area. When police executed the search warrant, they apparently (the Court of Appeals opinion does not provide details on this point) failed to show the search warrant to Ollivier at the outset of the search.

The Court of Appeals rejects Ollivier's challenge to the probable cause for the search warrant in which he asserted that the affidavit failed to establish the credibility of the roommate informant. On informant-based probable cause, Washington courts follow what is known, based on U.S. Supreme Court decisions from the 1960s, as the 2-pronged Aguilar-Spinelli test. The informant must be shown (1) to be credible, and (2) to have a first-hand basis of knowledge for the informant's assertions.

Credibility of certain classes of persons can be established based simply on their status, such as with fellow officers or citizen informants. For informants involved in the criminal world, it is necessary to establish credibility based on such things as (1) track record or (2) the informant's giving of self-incriminating information to police. See State v. Chenoweth, 160 Wn.2d 454 (2007) **Sept 07 LED:04** (statements against penal interest); State v. Chamberlin, 161 Wn.2d 30 (2007) **Sept 07 LED:07** (same). The Ollivier Court explains that another basis for finding credibility of an informant is a person trading information with police or prosecutors seeking a break, because in this context the person "has a strong motive to be accurate." The Court cites State v. Bean, 89 Wn.2d 467 (1978). Credibility was established on this basis the Ollivier Court concludes.

On defendant's challenge to the police failure to meet Criminal Rule 2.3(d) by showing the search warrant to him before beginning the search, the Ollivier Court relies in part on State v. Aase, 121 Wn. App. 558 (Div. II, 2004) **July 04 LED:20**, which held that the law enforcement error of delay in showing a search warrant to the resident of the premises to be searched must be shown to have been prejudicial in order to justify exclusion of evidence seized under the search warrant. No prejudice was shown in this case, the Ollivier Court holds.

Result: Affirmance of King County Superior Court convictions of Brandon Gene Ollivier for violating RCW 9.68A.070 by unlawful possession of depictions of minors engaging in sexually explicit conduct.

LED EDITORIAL COMMENT: To once again belabor the obvious, where a resident is present when officers begin execution of a search warrant, officers should show the warrant to the resident before beginning the search.

(2) NO INVASION OF PROVINCE OF JURY OCCURRED WITH DETECTIVE'S TESTIMONY THAT DURING INTERROGATION, IN ORDER TO SEE IF DEFENDANT WOULD CHANGE HIS STORY, HE TOLD DEFENDANT HE WAS LYING; ALSO, EVIDENCE IS SUFFICIENT TO SUPPORT PREMEDITATION ELEMENT OF FIRST DEGREE MURDER – In State v. Notaro, 161 Wn. App. 654 (Div. II, 2011) (decision filed May 6 , 2011), the Court of Appeals rejects all of defendant Notaro's challenges to his first degree murder conviction for a murder committed in 1978 and prosecuted in 2009 (after the victim's bones were found in 2007 during excavation for a construction project). **[LED EDITORIAL NOTE: Notaro and Curtiss (see LED entry below regarding the Curtiss case) are brother and sister. In 1978 Tarricone (the victim) visited Notaro's and Curtiss's mother's residence. Notaro lured Tarricone into the basement, shot him twice in the back of the head, and with the assistance of Curtiss and their mother (who has since died) buried the remains in the backyard. In 2007, a construction company preparing to build a shopping center on the property discovered the human remains.]**

One of defendant Nataro's unsuccessful arguments was that the trial court impermissibly allowed a detective to invade the province of the jury as fact-finder. The general rule is that witnesses are not allowed to give their opinions as to a criminal defendant's guilt or innocence or veracity. The trial court allowed a detective's testimony regarding police interrogation strategy that included a statement by the detective to suspect Notaro in which the detective told Notaro that he thought Notaro was lying. The interrogation strategy, the detective explained in his trial testimony, was to see if Notaro would change his story.

Relying on the Washington Supreme Court precedent of State v. Demery, 144 Wn.2d 753 (2001) **Dec 01 LED:15**, the Notaro Court concludes that such testimony about interrogation statements and strategy is not the type of witness statement that carries a special aura of reliability that usurps the province of the jury at trial. The Notaro Court further holds in the alternative on this jury-province question both that Notaro waived any challenge to the testimony, and that in light of other evidence any error in admitting the testimony was harmless.

The Court also rejects Notaro's argument that the trial record contains insufficient evidence of premeditation to support his first degree murder conviction. Sufficient evidence of premeditation was established, the Notaro Court holds, in (1) evidence of Notaro's statements to detectives and to another person that, while armed with a handgun, he lured the victim into the basement of the Canyon Road house on the pretext of fixing a washing machine, and, once there, shot him twice in the back of the head; and (2) evidence that, after his sister asked him to do the

killing, Notaro bought the murder weapon in Alaska and flew from Alaska to Washington to do the killing.

Result: Affirmance of Pierce County Superior Court conviction of Nicholas Louis Notaro for premeditated first degree murder while armed with a firearm.

(3) DEFENDANT'S CUSTODIAL STATEMENTS WERE VOLUNTARY EVEN THOUGH SHE MAY NOT HAVE UNDERSTOOD THE FULL CONSEQUENCES OF HER DECISION TO TALK TO DETECTIVES – In State v. Curtiss, 161 Wn. App. 673 (Div. II, 2011) (decision filed May 6, 2011), the Court of Appeals rejects all of the challenges by defendant Curtiss to her first degree murder conviction for a murder committed in 1978 and prosecuted in 2009 (after the victim's bones were found in 2007 during excavation for a construction project).

One of the appellate court arguments by Curtiss was that her statement to detectives was not voluntary. Her theory was that she did not fully understand the consequences of her decision to give a statement. During the Mirandized interrogation, after some preliminary questioning, one of the detectives asked Curtiss if she had known in 1978 about the murder of her former boyfriend. She replied: "Yes, I did know about it" and then added "I don't know what I'm supposed to say." The detective responded that she should tell the truth, to which she replied: "I don't know if I supposed to talk to an attorney." The detective reminded her of her Miranda attorney rights, which she said she understood. Then the detective explained that the statute of limitations had run out for any prosecution for rendering criminal assistance after the murder. She later testified at trial that this explanation relaxed her somewhat. She continued to talk to detectives, and in a taped statement, she ultimately confessed to covering up the murder but denied soliciting the murder or participating in or even being present at the time of the murder.

After completing the tape-recorded portion of the interrogation, one of the detectives told Curtiss that he did not believe her story. He said he believed she solicited the murder and was present during the murder. After a pause, she gave a hedged response, saying: "I don't know if I was there. I can't remember. I don't think I was."

The Curtiss Court's analysis of the issue of voluntariness of the defendant's interrogation statements is as follows:

> Curtiss . . . assert[s] that she did not knowingly and voluntarily waive her Miranda rights. Specifically, she assigns error to the trial court's conclusion that [the detectives] did not use deceptive tactics that "dilute[ed] the protections Miranda guarantees." We hold that Curtiss knowingly and voluntarily made her police interview statements.
>
> We examine the totality of the circumstances to determine if statements made during a custodial interrogation were coerced by any express or implied promise or by the exertion of improper influences. State v. Unga, 165 Wn.2d 95 (2008) **March 09 LED:15**; State v. Broadaway, 133 Wn.2d 118 (1997). This examination includes considerations of the location, length, and continuity of the interrogation; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of her Fifth Amendment rights. Unga. Police lies, promises, or misrepresentations during an investigation do not automatically render any resulting statements inadmissible. Broadaway. But if the police tactics manipulated or prevented a defendant from making a rational, independent decision about giving a statement, the statement is inadmissible. Unga; Broadaway.

> Here, [the detective's] accurate statement about the expired statute of limitations for rendering criminal assistance did not override Curtiss's independent decision-making process or coerce her into giving a statement. At trial, Curtiss testified that she gave her taped statement because she knew "the participation that [she] had been involved with would be included in [the rendering criminal assistance charge that [the detective]] said could not be charged."
>
> Curtiss's testimony shows that she balanced competing interests and then knowingly and voluntarily gave her statement to the police limiting her admissions to events following Tarricone's murder. Curtiss's failure to realize the possible consequences of giving the statement does not change its voluntary nature State v. Heggins, 55 Wn. App. 591 (1989) (stating that the United States Supreme Court has "never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness" when assessing the voluntariness of custodial statements).
>
> Curtiss also argues that her statement during the interview, "I don't know if I'm supposed to talk to an attorney," shows that she did not understand her rights. [*Court's footnote: On appeal, Curtiss expressly waived any argument that her statement was a request for an attorney that should have ended the interrogation.*] She contends that her statement is a "clear indication that [she did] not fully understand her right to counsel and [sought] clarification." But immediately after making her attorney statement, the police reminded her of her Miranda rights, specifically her right to counsel, and she indicated that she understood her rights. Reviewing the entire circumstances of the interrogation, we hold that Curtiss knowingly, voluntarily, and intelligently made the taped statements describing her involvement in Tarricone's murder. The trial court did not err in admitting her taped statements at trial.

[Some citations omitted]

Result: Affirmance of Pierce County Superior Court conviction of Renee Ray Curtiss for premeditated first degree murder.

(4) FIRST DEGREE CHILD RAPE: SUFFICIENT EVIDENCE HELD TO SUPPORT STEPFATHER'S CONVICTIONS ON FOUR COUNTS DESPITE SOME INCONSISTENCIES BETWEEN THE VICTIM'S TESTIMONY AND HER EARLIER OUT-OF-COURT ACCOUNTS – In State v. Corbett, 158 Wn. App. 576 (Div. II, 2010) (decision filed November 16, 2010), the Court of Appeals rejects the defendant's argument that because his step-daughter victim in this four-count child rape prosecution had her eyes closed (at his direction) on three of the four alleged events in which he put his penis in her mouth, she did not provide sufficient evidence to support four convictions. The Court also rejects his argument that the child's testimony was so inconsistent with her out-of-court accounts that the convictions cannot stand. The Court explains as follows why it rejects defendant's arguments:

> The evidence against Corbett is overwhelming. At trial, J.O. testified that, when she was 6 and 7 years old and lived with Corbett, who was around 30 years old at the time, (1) on three separate occasions while her eyes were closed [in what Corbett had told the child was a "candy-taste game"], Corbett put a "soft thing" in her mouth that felt like skin, did not have a fingernail, and had no flavor; (2) on a fourth occasion she saw under cotton balls that were taped to her eyes that

Corbett was putting his penis in her mouth; and (3) the feel of Corbett's penis in her mouth during the fourth incident matched the feel of the "soft thing" Corbett had put in her mouth on the other three occasions. Moreover, at least four other witnesses at trial testified that over the course of two years, J.O. made statements to them that included details similar to those that J.O. testified to at trial.

Corbett contends that J.O. could identify in only one instance [the occasion when saw under the cotton balls over her eyes] exactly what he put in her mouth. But J.O. testified that the feel of Corbett's penis in her mouth in the last incident was the same feeling she had regarding the "soft thing" in her mouth in the other instances. Circumstantial evidence and direct evidence are equally reliable. Based on J.O.'s trial testimony, any rational trier of fact could have found beyond a reasonable doubt that Corbett committed the essential elements of first degree child rape on four separate occasions.

Next, Corbett attempts to discredit J.O. by arguing inconsistencies in her pretrial and trial statements about some of the details of the abuse. Specifically, Corbett argues that J.O.'s pretrial and trial statements conflict as to the (1) location of the abuse, (2) substances placed on Corbett's penis during the abuse, and (3) whether Corbett threatened her if she told anyone about the abuse.

Corbett points to State v. Alexander, 64 Wn. App. 147 (1992), to argue that J.O.'s inconsistencies are so extreme that a rational jury could not have found beyond a reasonable doubt that he sexually abused her. In Alexander, Division One of this court overturned multiple child rape convictions, in part because of extreme inconsistencies in the child victim's testimony at trial. There, the child victim directly contradicted herself about whether a bathtub abuse incident ever occurred and whether her abuser used baby oil. Moreover, the victim's testimony [in Alexander] as to the relative dates of her abuse contradicted her mother's testimony about times when the victim was around the alleged abuser.

In contrast, J.O.'s inconsistencies do not reach the level of those detailed in Alexander; Corbett's arguments are unpersuasive and fail for several reasons. As an initial matter, regardless of whether inconsistencies exist in J.O.'s statements, we defer to the trier of fact, here the jury, on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. . . .

Moreover, our review of the record reveals that the inconsistencies in J.O.'s statements were not as significant as Corbett asserts. Although we acknowledge that J.O.'s pretrial and trial statements do directly contradict about whether Corbett threatened her, we do not agree with Corbett's claims of other inconsistencies in J.O.'s statements or that they are similar to the inconsistencies in Alexander.

Our review of the record in this case reveals no inconsistencies regarding the location of the abuse. . . .

Inconsistencies on what specific substance (or substances) Corbett placed on his penis during the abuse were not extreme. Corbett went to great length at trial, and on appeal, to point out that, at trial, J.O. testified that he only ever put "frosting" or "icing" on his penis but that prior to the trial, she told people that he

used "whipped cream" or "chocolate." Corbett overlooks a significant common thread between all these substances – all of them are sweet and sugary substances. That over a period of several years J.O. may have mentioned slightly different substances that were similar in nature is not an extreme inconsistency, especially when considering that J.O. was only six or seven at the time of the abuse and that her eyes were closed during each incident except for the last one.

Given the limited discrepancies in J.O.'s testimony, Alexander is distinguishable. Here, J.O.'s inconsistencies are (1) whether Corbett threatened her if she told anyone about the abuse and (2) which sweet substance Corbett sometimes put on his penis. This contrasts with Alexander where the victim provided testimony that contradicted other substantive evidence on whether the abuse occurred at all. The relative temporal references that J.O. offered during the trial for when the abuse occurred were uncontradicted, and she never recanted or suggested in any way that Corbett did not sexually abuse her at least four separate times. Accordingly, sufficient evidence supports each of Corbett's four convictions and we affirm them all.

[Footnote and some citations omitted]

Result: Affirmance of Pierce County Superior Court convictions of Edwin David Corbett on four counts of first degree child rape.

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NEXT MONTH

The October 2011 LED will include the Division III Court of Appeals decision in State v. Byrd, ___ Wn. App. ___, 2011 WL 2802918 (2011) (decision filed July 19, 2011), where the Court held in a 2-1 decision that the principles of Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13** apply to the search of a purse incident to arrest.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at

[http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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